notice of meeting. For the reason given earlier owing to the lacking in material particulars in the pleading, the averment cannot stand to establish that the transfer of shares and registration were illegal and invalid thereby disentitling the two defendants to be members of the company. For the reasons stated, I am satisfied that there is no basis for the granting of the various declarations sought in prayers (ii), (iii) and (iv) of the amended statement of claim of the plaintiff.

Under prayer (iv)(a) the plaintiff prays for a declaration that any of the board of directors' meetings of the company attended by the two defendants in their capacities as directors including the board's meeting to be held on 2 June 1993 in Kuala Lumpur were illegal and invalid. By para 20 of the amended statement of claim the plaintiff avers that by a notice of a board meeting dated 26 May 1993 the third defendant convened a board meeting to be held in Kuala Lumpur on 2 June 1993. If for the reason stated earlier that the material facts are not sufficiently pleaded to enable the determination of the status of the two defendants as members of the company, this prayer certainly has no merit at all.

For the same reason there is no merit on the pleadings of the plaintiff for orders sought in the rest of the prayers contained in the amended statement of claim of the plaintiff. In the circumstances I agree with the defendants that the amended writ of summons and amended statement of claim both dated 17 June 1993 disclose no reasonable cause of action. On this ground alone, I am satisfied that the pleadings of the plaintiff ought to be struck out. It is no longer necessary for me to go further to determine whether they are scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court, as it is clear in my mind that the pleadings as they stand, are lacking in material particulars to found an action against the three defendants.

The claim by the plaintiff against the three defendants is hereby struck out under O. 18 r. 19 of the RHC with costs of the action including costs of this application to the defendants to be taxed.

LIAN HUP MANUFACTURING CO. SDN. BHD.

v.

UNITATA BERHAD

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[ORIGINATING MOTION NO. R8-32-116-87]
15 FEBRUARY 1994

ARBITRATION: Sections 23 & 24 Arbitration Act 1952 - Application to set aside award of arbitrator or alternatively that award be remitted to another arbitrator to be heard afresh - Allegation by applicant of misconduct by arbitrator - Whether arbitrator conducted proceedings fairly - Whether applicant refused opportunity to call witnesses - Whether submissions by Counsel for respondent improperly allowed - Allegation that arbitrator awarded different rates of interests on various dates on the award without hearing any evidence - Whether arbitrator exceeded authority - Consideration of s. 11 Civil Law Act 1956.

The case before the Court was an application by the applicant pursuant to s. 23 and/or s. 24 of the Arbitration Act 1952 (Revised 1972) and/or under the inherent jurisdiction of the Court to set aside the award of the arbitrator dated 2 September 1987 or alternatively; that the award be remitted to another arbitrator to be heard afresh.

At the hearing of the application Counsel for the applicant alleged that the arbitrator had misconducted himself in the course of the proceedings. Two grounds were mainly relied on, namely; that the applicant's witnesses were not heard by the arbitrator and that the arbitrator had exceeded his authority in awarding interest at different rates in respect of each year from 1984 to 1987. Counsel for the respondent on the other hand submitted that there was no irregularity in the arbitration proceedings or in the award and even if there was an irregularity, no substantial miscarriage of justice had been caused.

Held:

[1] It was not in dispute that the arbitrator heard the oral evidence of the respondent's representative. The Court found nothing in the record of the arbitration proceedings on 22 May 1987 that the arbitrator refused to hear the oral evidence of the applicant's witness. However, the Court found that the arbitrator should have given the witnesses of both parties the opportunity to be heard at the continued hearing as the

applicant had indicated its intention to give such evidence. There was no waiver in this case.

[2] At the request of Counsel for the applicant the arbitrator adjourned the hearing and gave the applicant two weeks from the date of hearing to file supplementary documents but the documents were dated 16 June 1987 which meant they were filed on or after 16 June 1987, that is; more than two weeks from the previous date of hearing. In his award the arbitrator took the applicant's reply dated 16 June 1987 and the documents exhibited thereto into consideration. The Court was of the view that the award was made prematurely. However, this was only a mere irregularity which could be rectified. The Court was satisfied that this irregularity would not have caused a substantial miscarriage of justice as there was nothing radically wrong in the proceedings before the arbitrator.

[3] In the present case the parties had agreed in the arbitration clause in the contract that the construction, validity and performance be governed by Malaysian law. Under s. 11 of the Civil Law Act, the Court has the discretionary power to award interest for the recovery of any debt or damages. In the Court's view the arbitrator had the same power as that of the Court to award interest at such rate as he thought fit. Since it was within the discretion of the arbitrator to award interest in this case, the Court would not interfere with the exercise of his discretion.

[The matter was remitted to the arbitrator for reconsideration and the applicant was granted half the taxed costs].

Cases referred to:
Pegang Prospecting Co. Ltd. v. Chan Phooi Hoong & Anor. [1957] 23 ML J 231 ***(cit)***
Podar Trading Co. Ltd. Bombay v. Francois Tagher, Barcelona [1949] 2 All ER 62 ***(cit)***
Chandris v. Isbrandsen - Moller Co. Inc. [1951] 1 KB 240 ***(refd)***
Evergrip Prestressing Sdn. Bhd. v. Ken Construction & Trading Sdn. Bhd. [1991] 3 CLJ 2149 ***(cit)***

Legislation referred to:
Arbitration Act 1952, ss. 23, 24
Civil Law Act 1956, s. 11
Civil Procedure Act 1833 (India)

Other sources referred to:
Law of Arbitration, Russell, 20th Edn., p. 410

For the applicants - L. Parthiban; M/s. L. Parthiban & Associates
For the respondents - R. Gomez; M/s. Shearn Delamore & Co.

JUDGMENT

Dr. Zakaria Bin Mohd Yatim J:
This is an application by Lian Hup Manufacturing Co. Sdn. Bhd. pursuant to s. 23 and/or s. 24 of the Arbitration Act 1952 (Revised - 1972) and/or under the inherent jurisdiction of the Court, for an order that the award of the arbitrator dated 2 September 1987 be set aside; or alternatively that the award be remitted to another arbitator or arbitrators to hear the arbitration afresh.

The applicant alleged that the arbitrator misconducted himself in the course of the arbitration proceeding:

(i) by conducting the proceeding without giving a fair hearing to the application and by failing to observe the rules of natural justice;

(ii) by not giving or refusing the applicant the opportunity to call witnesses to adduce oral evidence on its behalf;

(iii) by improperly allowing submissions by Counsel for the respondent to be admitted to consider the applicant's defence of waiver or variations of the terms and conditions.

The applicant further alleged that the arbitrator had exceeded his authority by awarding arbitrarily different rates of interests on various dates on the award without hearing any evidence in respect of interest from either party.

After hearing the submissions of both Counsel for the applicant and Counsel for the respondent and after considering the affidavit and the documentary evidence, I made the following order:

(1) The arbitrator should have given both parties the opportunity to give evidence of witnesses. The applicant did indicate its intention to give such evidence at the continued hearing. I think there is no waiver in this case. In the circumstances the award is remitted to the arbitrator for his reconsideration.

(2) In view of (1) above I direct that the applicant be entitled to half the taxed costs.

At the hearing of the application Mr. Parthiban, Counsel for the applicant relied mainly on two grounds. He urged the Court to set aside the award not only on the ground that the applicant's witnesses were not heard by the arbitrator, but also on the ground that the arbitrator had exceeded his authority in awarding interest at

different rates in respect of each year from 1984 to 1987.

In support of his contention that the award be set aside he cited *Pegang Prospecting Co. Ltd. v. Chan Phooi Hoong & Anor.* [1957] 23 MLJ 231, where the Court of Appeal of the then Federation of Malaya, decided that since the arbitrator decided only on questions relating to mining and refused to decide on question of law, the award should not be remitted but must be set aside. Mr. Parthiban also cited *Podar Trading Co. Ltd. Bombay v. Francois Tagher, Barcelona* [1949] 2 All ER 62, where it was decided *inter alia* that the arbitrator could only give interest in circumstances in which it was recoverable at common law, namely, by agreement or by mercantile custom and there being no agreement or custom in that case, interest could not be awarded.

Mr. R Gomez, Counsel for the respondent submitted that there was no irregularity in the arbitration proceeding or in the award and asked the Court to dismiss the application. He said that even if there was an irregularity no substantial miscarriage of justice had been caused. He told the Court that *Podar Trading Co. Ltd Bombay v. Francois Tagher, Barcelona,* was overruled by the Court of Appeal in *Chandris v. Isbrandsen - Moller Co. Inc.* [1951] 1 KB. 240 on the question of interest. In that case, Tucker LJ, in his judgment at pages 262 and 263 said:

> Mr. Mocatta argued that that judgment was based upon the assumption that it was the Civil Procedure Act 1833, which gave the arbitrator his power to award interest; that, once that Act was repealed, all such powers had gone; and that, unless the arbitrator were given fresh powers, he had none. I think that that was the reasoning in this judgment. But I agree with Mr. Mocatta that the real basis of *Edwards v. Great Western Ry.* (64) was not that the arbitrator derived his powers from the Act of 1833, but that he derived them from the submission to him, which necessarily gave him the "implied powers" - referred to by Lord Salvesen; and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as this the arbitrator has power to award interest. Accordingly, to that extent, I think, this appeal should succeed and *Podar Trading Co. Ltd. Bombay v. Francois Tagher, Barcelona* (65) should on this point be overruled.

According to *Chandris* case, the power of an arbitrator to award interest was derived from the submission to him which impliedly gave him power to decide all matters of difference according to the existing law of contract exercising every right and discretionary remedy given to a Court of Law. The Court decided that the arbitrator had the power to award interest.

In the present case the parties have agreed in the arbitration clause in the contract (Enclosure 1 Exhibit LWH 2) that the construction, validity and performance be governed by Malaysian law. Under s. 11 of the Civil Law Act, the Court has the discretionary power to award interest for the recovery of any debt or damages. See *Evergrip Prestressing Sdn. Bhd. v. Ken Construction & Trading Sdn. Bhd.* [1991] 3 CLJ 2149. In my view the arbitrator in the present case has the same power as that of the Court to award interest at such rate as he thinks fit. Since it was within the discretionary power of the arbitrator to award interest in this case, the Court would not interfere with the exercise of his discretionary power.

I shall now deal with the question of oral evidence. It is not in dispute that the arbitrator heard the oral evidence of the respondant's representative. I find nothing in the record of the arbitration proceeding held on 22 May 1987 (Enclosure 1 Exhibit LWH 5) that the arbitrator refused to hear the oral evidence of the applicant's witness.

At the hearing of the arbitration on 22 May 1987 (LWH 5 p. 17) Mr. Parthiban, who was also Counsel for the respondent/applicant then, requested for more time to file supplementary documents. The arbitrator adjourned the hearing and gave the applicant two weeks from the date of hearing to file their documents. But the applicant's reply to claimant's documents is dated 16 June 1987. (LWH 6). This means that the documents were filed on or after 16 June 1987 that is more than two weeks from the previous date of hearing. In his award, the arbitrator took into consideration the applicants reply dated 16 June 1987 and the document exhibited thereto.

In my view, the award was made prematurely. This is only a mere irregularity which can be rectified. I am satisfied that this irregularity would not have caused a substantial

miscarriage of justice. It has been said that the Court "must not be over ready to set aside awards where the parties agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." Russell on the the **Law of Arbitration** 20 Edn. page 410. I find nothing radically wrong in the proceeding before the arbitrator.

I was satisfied that in the circumstances of the present case, the proper order was to remit the matter to the arbitrator for his reconsideration.

For the reasons I have already stated, I made the order as stated above.

LIM JOO THONG

v.

KOPERASI SERBAGUNA TAIPING BARAT BERHAD

HIGH COURT, TAIPING
DATO' HJ ABDUL MALIK BIN HJ ISHAK JC
[ORIGINATING SUMMONS NO. 24-262-1993]
6 JUNE 1994

ARBITRATION: Arbitration Award - Setting aside - Procedures - Application to set aside award made by way of affirmation of affidavit - Whether proper - Whether application to be by way of originating motion - Application made four months after making of award - Whether out of time - Rules of the High Court 1980, O. 69 r. 4(1)(b) - Arbitration Act 1952 s. 24(2).

The plaintiff, who undertook and completed the construction of 177 units of houses for the defendant pursuant to an agreement executed on 29 February 1984, filed a suit in the High Court, Ipoh, to claim some disputed payment in respect of his work thereof. However by an order dated 6 August 1992, the High Court stayed proceedings in respect this suit and ordered the dispute to be arbitrated in line with clause 34(1) of the agreement, which provided for such arbitration. In consequence, the plaintiff wrote to the President, Persatuan Akitek Malaysia (PAM) requesting the latter to appoint an arbitrator and following that, the President of PAM, one Mr. Jimmy C.S. Lim, appointed one Mr. W.Y. Chin as arbitrator.

The defendants refused to submit to arbitration. The arbitration thus proceeded *exparte* and on 28 October 1993 the arbitrator handed down his award ordering the defendant, *inter alia*, to pay the plaintiff RM2,372,265.45 in respect of the building contract. A copy of this Arbitration Award was later served on the defendant on 2 November 1993.

In the meanwhile, on 27 October 1993, the President of FAM, one Haji Esa, wrote to both the plaintiff and the defendant informing them that the appointment of Mr. W.Y. Chin as the arbitrator was improper as Mr Jimmy C.S. Lim was not the lawful President of PAM at the material time and therefore could not lawfully exercise the relevant power of appointment.